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OCTOBER TERM, 1962

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JOHN F. DAVIS, CLERK

No. 77

JOHN R. JONES,

Petitioner,

vs.

W. K. CUNNINGHAM, JR., Superintendent of the
Virginia State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Court of Appeals dismissing the appeal as moot (R. 24-33) is reported at 294 F. 2d 608. The opinion of the District Court (R. 12-13) is unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on September 14, 1961 (R. 34). The petition for a writ of certiorari was filed on October 26, 1961, and was granted on March 5, 1962 (R. 35). The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Statutes Involved

The following portions of 28 U.S.C. §2241 are involved:

(a) Writs of habeas corpus may be granted by . . .
the district courts . . . within their respective jurisdictions . . .

• • • • •

(c) The writ of habeas corpus shall not extend to a prisoner unless

• • • • •

(3) He is in custody in violation of the Constitution . . . of the United States . . .

Virginia Code, §§53-257, 53-258, 53-259, 53-262, 53-264, and the Uniform Act for Out-of-State Parolee Supervision are set forth in the Appendix, *infra*.

Questions Presented

1. Whether a state prisoner's appeal from the denial of his habeas corpus petition challenging the constitutionality of his sentence should be dismissed as moot when, after the appeal is taken, the prisoner is placed on parole under the continuing custody of state officials and subject to substantial restraints on his liberty.
2. Whether, if habeas corpus is considered unavailable as a remedy for a prisoner on parole, the Court of Appeals should be directed to treat the case as an action for declaratory judgment and thereby adjudicate petitioner's claim that his sentence was imposed in violation of his constitutional right to counsel.

Statement

Petitioner John R. Jones, a prisoner in the Virginia State Penitentiary, filed a petition for habeas corpus in February, 1961, in the United States District Court for the Eastern District of Virginia, alleging that he was held by respondent in violation of the Fourteenth Amendment to the Constitution (R. 1-8). Specifically, petitioner averred that he was serving a ten-year recidivist sentence which was based in part upon a 1946 larceny conviction imposed by a Virginia court in violation of his constitutional right to counsel; the larceny conviction was therefore void and this in turn rendered the recidivist sentence void.¹

The petition alleged that at the larceny trial in 1946 in the Chesterfield County Circuit Court, petitioner was without counsel, that he was not offered counsel by the court nor informed that he was entitled to counsel, that he was not aware that the court could appoint counsel to defend him; petitioner was then 20 years old, a private in the Army and financially unable to obtain counsel (R. 3). At a conference before trial attended only by the state prosecuting attorney, an F.B.I. agent and petitioner, it was agreed that petitioner would plead guilty to two counts of larceny of an automobile and that certain federal charges would be dropped. Petitioner at no time had the advice of an attorney (R. 5-6). The court thereupon imposed a sentence of eighteen months in the Virginia Penitentiary (R. 1). The recidivist sentence petitioner is now serving, based partially on that conviction, was imposed by the Cir-

¹ A recidivist sentence (under Va. Code, § 53-296) is void under the Fourteenth Amendment if one of the convictions on which it rests is invalid because it was imposed in violation of the constitutional right to counsel; and the recidivist sentence may be collaterally attacked on this ground. *Fitzgerald v. Smyth*, 194 Va. 681, 74 S.E.2d 810 (1953); *Holly v. Smyth*, 280 F.2d 536, 539 (4th Cir. 1960).

cuit Court of the City of Richmond in November, 1953 (R. 2, 9).

Pursuant to an order of the District Court (R. 10-11), respondent filed a return in which he admitted that petitioner was not represented by counsel at the 1946 larceny trial and that the recidivist sentence was based in part on that conviction (R. 9). Respondent, however, denied generally that the want of counsel violated any constitutional right (R. 9-10). He further asserted that petitioner had been accorded a hearing on this claim in the Chesterfield court in 1958, as evidenced by exhibits attached to the return (R. 9).

The District Court thereupon dismissed the petition without a hearing on the ground that petitioner had already been afforded a hearing on his right-to-counsel claim in the state courts and further that he had failed to show any special circumstances necessitating counsel at the 1946 trial (R. 12-13). The Court of Appeals then granted a certificate of probable cause and leave to appeal *in forma pauperis* (R. 17). Counsel were appointed to represent petitioner on the appeal (R. 17). The case was set for argument on June 23, 1961 (R. 22), and briefs on the counsel question were filed by both sides.

Approximately one week before argument the assistant attorney general representing respondent notified petitioner's court-appointed counsel that petitioner was being placed on parole by the Virginia Parole Board² and that respondent would move to dismiss the appeal (R. 18). On June 22, 1961, the day before argument, respondent did file a motion to dismiss on the ground that the case was

² For a discussion of parole for prisoners serving recidivist sentences in Virginia see Note, Recidivism and Virginia's "Come Back" Law, 48 Va. L. Rev. 597, 631-33 (1962).

moot since petitioner as a parolee would no longer be in respondent's custody (R. 19). Attached to the motion was a copy of the parole board's order placing petitioner in the custody of the board; effective June 26, 1961, and prescribing the terms of parole (R. 20-22). The order directed petitioner to live with his aunt and uncle in LaFayette, Georgia, where he would be supervised by a Georgia parole officer pursuant to the Uniform Act for Out-of-State Parolee Supervision; the order forbade petitioner to live elsewhere without official permission, and it laid down numerous other directions as to what he could do and not do (R. 19-21). Petitioner is now in Georgia on parole under this order.

On June 23, 1961, the case came on for argument in the Court of Appeals on the right-to-counsel question and the motion to dismiss (R. 22). Thereafter both parties filed memoranda on the mootness problem (R. 22). Counsel for petitioner also filed a motion to make the three members of the Virginia Parole Board parties respondent to the habeas corpus petition on the ground that they now had custody of petitioner, rather than the superintendent of the penitentiary (R. 23).

The Court of Appeals, on September 14, 1961, entered a judgment dismissing the appeal (R. 34), explaining in an opinion by Judge Haynsworth (R. 24-31) that habeas corpus could not now be maintained "for the prisoner is now at large on parole. He is no longer in the custody of the defendant, the Superintendent of the Virginia State Penitentiary, where he had been confined" (R. 24). A concurring opinion was written by Judge Sobeloff (R. 31-33). The motion to make the board members parties was denied.

³ In the printed Transcript of Record there is a typographical error in this motion (R. 23). The first word in paragraph 1 should be *Appellant* and not *Appellee*.

This Court then granted petitioner's motion for leave to proceed *in forma pauperis* and granted a petition for certiorari "limited to the question of 'mootness'" (R. 35). 369 U.S. 809.

Summary of Argument

I.

The Court of Appeals erred in holding that petitioner as a state prisoner on parole is not in "custody" within 28 U.S.C. §2241 and that habeas corpus is therefore unavailable as a means of attacking the constitutionality of his sentence. The error stems from the historically incorrect premise that habeas corpus lies only where there is actual physical detention. Contrary to the view of the court below, the Great Writ in England and America has been the remedy to remove any illegal restraint of liberty, even though it did not amount to physical custody. The test emerging from the cases is that the writ is available to anyone deprived by another of his liberty to go when and where he otherwise could lawfully go. The present federal statute incorporates this practice, and the word "custody" in §2241 is simply a shorthand label for the whole range of restraints encompassed by this rationale.

As a paroled state prisoner, petitioner is clearly within the test. He is deprived by the state parole board of the liberty to leave the town where he is told to live, to work at a job of his choice, to select the people with whom he wishes to associate, and to live in the house he likes. The terms of the parole order, backed up by Virginia statutes, substantially circumscribe his freedom and subject him to restraints to which the public generally is not subject. Petitioner can be arrested by the parole officials and put back into prison at any time without a hearing. On parole he remains under control of state officials by virtue of the

sentence which he asserts to violate his constitutional right to counsel. The shadowy, easily broken line between prison and parole is an irrational basis on which to deny petitioner a writ of habeas corpus.

Courts have issued the writ in other cases where there was no physical restraint. For example, habeas corpus has been the means for adjudicating the legality of an induction into the military service, for deciding on the custody of a child, of determining the validity of an indenture covering an apprenticed servant, and for passing on an order preventing aliens from entering this country. The restraints in these cases were similar to that imposed on the parolee here in that freedom of mobility was substantially impaired but there was no physical incarceration.

The change of petitioner's custodian from the superintendent of the penitentiary to the parole board and the removal of petitioner from the Eastern District of Virginia after his petition was filed do not divest the court of jurisdiction since petitioner was imprisoned in the district when his petition was filed and the new custodians remain there subject to the process of the court. Moreover, the parole board is empowered by Virginia statutes, the parole order, and the Uniform Act for Out-of-State Parolee Supervision to produce petitioner in the district court in response to the writ. The case is squarely within *Ex parte Endo*, 323 U.S. 283. Petitioner's motion to join the parole board members as parties should have been granted since they are now the appropriate habeas corpus respondents.

II.

Even if the Court should conclude that habeas corpus is not now an appropriate remedy because petitioner is not in "custody", the case should not be dismissed. The Court of Appeals should then be directed to treat this as an action

for declaratory judgment and proceed to decide the constitutional question. A declaratory judgment may be given because there is a justiciable controversy between petitioner and the parole board arising under the Constitution. Petitioner seeks to redress the deprivation by the state of his constitutional right to counsel. He asserts that the sentence under which he is held on parole is invalid, and the parole board asserts that it is valid. Furthermore, there is no other remedy now open to petitioner.

Since a declaratory judgment would be appropriate, it should be rendered in the pending proceeding, without petitioner's being required to file suit again. The forms of action and rigid theory of pleading concepts have been abandoned in the federal courts. The remedy initially chosen by a petitioner is not controlling; the court will award whatever relief he is entitled to under the law, especially in a case like this where an indigent prisoner complains of the violation of a constitutional right.

ARGUMENT

I. Petitioner's Appeal From the District Court's Denial of His Habeas Corpus Petition Did Not Become Moot When He Was Paroled Because He Remains a Prisoner in Custody of State Officials Who Are Within the District Court's Jurisdiction Continuing the Restraint on His Liberty Under a Sentence Imposed in Violation of His Constitutional Right to Counsel.

When Jones filed his habeas corpus petition the federal court unquestionably acquired jurisdiction under 28 U.S.C. §2241 since petitioner was then imprisoned in the Virginia Penitentiary and alleged that he was held by the superintendent under a sentence imposed in violation of his constitutional right to counsel. In dismissing the case as moot

on the ground that petitioner was no longer in "custody" under §2241 since he had just been paroled, the Court of Appeals acted on the fundamentally erroneous premise that "custody" means only actual physical detention. That premise—which is also the basis of respondent's position—is unsupported by the history and purpose of habeas corpus, by §2241, and by the actual usage of the writ. Contrary to the Court of Appeals' view, habeas corpus lies to relieve a person of a variety of illegal restraints of liberty; the writ is not narrowly limited to cases of physical detention. And parole imposes restraint of a type which has traditionally been recognized as sufficient for habeas corpus.

A. Federal Courts Are Authorized to Issue Habeas Corpus for a Prisoner Even Though He Is Not in Actual Physical Custody Because Historically Habeas Corpus Is the Remedy for One Who Is Deprived by Another of His Liberty to Go When and Where He Otherwise Could Lawfully Go.

Habeas corpus jurisdiction has been vested in the federal judiciary by Congress from the very beginning. However, the present §2241(e)(3) is a descendant of an 1867 Act which, for the first time, empowered the courts to grant the writ "in all cases where any person may be restrained of his or her liberty in violation of the Constitution." 14 Stat. 385. In the Revised Statutes of 1875, this provision was brought forward and put in a slightly different form: "the writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he . . . is in custody in violation of the Constitution."⁴ The section immediately preceding this authorized the courts "to grant writs of habeas

⁴ Judiciary Act of 1789, 1 Stat. 81-82.

⁵ Rev. Stat. § 753 (1875).

corpus for the purpose of an inquiry into the cause of restraint of liberty."⁶

The 1875 provisions were retained verbatim in Title 28 of the United States Code, 1940 edition.⁷ But in the 1948 revision of Title 28 the phrase "for the purpose of an inquiry into the cause of restraint of liberty" was dropped.⁸ According to the revisers these words "were omitted as merely descriptive of the writ."⁹ Also, perhaps significantly, the phrase "prisoner in jail," first used in 1875, was changed without explanation to simply "prisoner."

This statutory history indicates that the word "custody" in §2241(e)(3) is synonymous with "restraint of liberty." The terms have been used interchangeably in the statutes since 1867. Nothing suggests that draftsmen along the way ever intended to narrow the availability of the writ by substituting "custody" for the earlier "restrained of his or her liberty." Indeed the 1948 reviser's note indicates there was no such design. Just recently this Court said of the 1867 provision: "Although the statute has been re-enacted with minor changes at various times the sweep of the jurisdiction granted by this broad phrasing has remained unchanged."¹⁰ "Custody" appears to be simply a shorthand way of expressing the whole range of restraints for which the writ lies.

Prior to the Act of 1867 the writ was authorized only "for the purpose of an inquiry into the cause of commitment." Debatably the older wording implies a narrower

⁶ Rev. Stat. § 752 (1875).

⁷ 28 U.S.C. § 452, 453 (1940 ed.).

⁸ 28 U.S.C. § 2241 (1948).

⁹ Reviser's Notes, 28 U.S.C.A. § 2241; H.R. Rep. No. 308, 80th Cong., 1st Sess. A177-A178 (1947).

¹⁰ *Irrin v. Dowd*, 359 U.S. 394, 404.

kind of detention.¹¹ "Commitment" has a fairly well-defined legal meaning.¹² It might be inferred that by abandoning it Congress intended to remove doubts as to the availability of the writ and to make clear that a petitioner need not be in jail but only under restraint of liberty in some manner.

But whatever the pre-1867 wording meant, reading the present §2241 broadly as authorizing inquiry into an unconstitutional restraint of liberty, and not as limiting the writ merely to physical imprisonment, is in line with the history and spirit of habeas corpus from its origin in England. This is important because the statute itself does no more than authorize federal courts to issue the writ; Congress has never spelled out its meaning, its purpose, or the occasions for its use. For this the federal courts look to habeas corpus as it developed at common law. *Ex parte Bollman*, 4 Cranch 75, 93; *Ex parte Parks*, 93 U.S. 18, 21; see *United States v. Hayman*, 342 U.S. 205, 210. And while the writ has been expanded in scope,¹³ the common law defines at least its minimum availability. Thus it is not so much the precise wording of the federal statute that governs the kind of restraint for which the writ lies as it is historical practice.

The Great Writ, or *habeas corpus ad subjiciendum*, which Jones here seeks, was developed at common law as the remedy for anyone illegally restrained of his liberty by another. See *McNally v. Hill*, 293 U.S. 131, 136-37. It

¹¹ In 1858 one text writer stated: "Whether the term 'commitment' as used in the statute [1789 Act] is to be construed as equivalent to 'imprisonment in gaol' under legal process, or as comprehending every kind of 'restraint, are questions which have not been decided by the Supreme Court." Hurd, *Habeas Corpus* 150 (1858).

¹² Black's Law Dictionary 341 (4th ed. 1957).

¹³ For a prisoner under sentence of a court the scope has evolved from an inquiry limited to the sentencing court's jurisdiction to an inquiry into the violation of the prisoner's fundamental rights. See *United States v. Hayman*, 342 U.S. 205, 210-12.

precipitates a judicial inquiry into the legality of the restraint. Though the early petitioners were mostly persons in prison, the remedy was not limited to them. The Court of Appeals was in error historically when it said that the writ "may issue only when the applicant is in the actual physical custody of the person to whom the writ is directed" and that the purpose of the writ is to test "the legality of a present, physical detention of a person" (R. 25). The key to the writ has been a less stringent notion of restraint of liberty. As one writer put it:

It is not necessary that the imprisonment or restraint should be close confinement to entitle a party to the writ.

Every restraint upon a man's liberty is, in the eye of the law, an imprisonment, wherever may be the place or whatever may be the manner in which the restraint is effected...

Words may constitute an imprisonment, if they impose a restraint upon the person, and he be accordingly restrained and submits . . . It may be on the high street and though the party be not put into any prison or house.¹⁴

Others have stated it thus:

The test as to the right to the writ is the existence of such imprisonment or detention, actual though it may not be, as deprives one of the privileges of going when and where he pleases. Actual physical restraint, as confinement in jail, is not necessary.¹⁵

¹⁴ Hurd, *Habeas Corpus* 209-10 (1858).

¹⁵ Ferris & Ferris, *The Law of Extraordinary Legal Remedies* 32-33 (1926). An almost identical statement appears in Church, *Habeas Corpus* 351 (1886), quoting from *Commonwealth v. Ridgway*, 2 Ashm. 247, 248 (Pa. 1839).

And a federal court has said: "The detention it seems, is sufficient, if it restrains the party of his right to go without question, or . . . without a string upon his liberty." *Mackenzie v. Barrett*, 141 Fed. 964, 966 (7th Cir. 1905).

Blackstone's Commentaries, although cited by the court below (R. 25), is not opposed to these views; Blackstone merely said that "the great and efficacious writ, in all manner of illegal confinement is that of *habeas corpus ad subjiciendum*." But he did not say that "all manner of illegal confinement" meant confinement behind locked doors and nothing else. Later, in pointing out that the writ would issue even in vacation, he commented that "the King is at all times entitled to have an account, why the liberty of any of his subjects is restrained; wherever that restraint may be inflicted." *III Blackstone Commentaries* 131 (4th ed. 1770).

In addition to Blackstone, the court below cited only a concurring opinion in *Heflin v. United States*, 358 U.S. 415, 421, where a statement is quoted from *McNatty v. Hill*, 293 U.S. 131, that "Without restraint of liberty, the writ will not issue." That is of course a sound proposition. But neither the facts nor the opinions in *Heflin* and *McNatty* remotely imply that there can be no restraint of liberty unless a person is physically detained in a narrow sense.

History reveals many cases on both sides of the Atlantic in which *habeas corpus* has issued for a variety of restraints short of bodily imprisonment. Examples may be seen in cases of soldiers complaining of illegal enlistments, apprenticed servants attacking their indentures, petitions challenging the custody of children, and aliens on Ellis Island seeking to invalidate an exclusion order barring them from entering this country though they are free to go elsewhere. These and other examples are analyzed in part C of the argument, *infra*. They bear out the rationale

suggested by the text writers: that a person is restrained of his liberty for habeas corpus purposes if he is prevented by another from going when and where he pleases, if he cannot "go without question . . . without a string on his liberty." Since no one in organized society is wholly free to go where he pleases (e.g., a man cannot go upstairs in a women's dormitory) the restraint contemplated is obviously something in addition to that already imposed on the public as a whole.

Reading §2241 against history and practice, it thus appears that a petitioner is in "custody" if he is in fact subjected to significant restrictions on his freedom of mobility to which citizens generally are not subjected, even though he is not in actual physical detention. Jones, as a prisoner on parole, is precisely in that position.

B. As a Paroled Prisoner, Petitioner Is Entitled to Challenge the Constitutionality of His Sentence by Habeas Corpus Because He Is in Custody of the State Parole Board Pursuant to the Sentence and Is Deprived by the Board of the Liberty to Go When and Where He Otherwise Would Have the Right to Go.

That petitioner, as a state prisoner on parole, is in the custody of state officials and under restraint of his liberty is made clear by the board's parole order and the Virginia Code, both of which expressly say petitioner is in "custody", thus using the exact language of §2241.

Section 53-238(2) of the Code authorizes the state parole board to place prisoners on parole. Section 53-264 states that a paroled prisoner shall be released "into the custody of the Parole Board." And §53-257 directs that "Each parolee while on parole shall comply with such terms and conditions as may be prescribed by the Parole Board."

Acting under this authority the board issued an order granting parole to Jones (R. 20-21). The order begins, in line with the statute, by placing petitioner "under the custody and control of the Virginia Parole Board," effective June 26, 1961. (Up to that point he had been in custody of the superintendent of the penitentiary.) The order imposes numerous "general and special conditions." The special conditions require petitioner to live at the home of a Mr. and Mrs. McKinney (his uncle and aunt) at LaFayette, Georgia, and to work for Mr. McKinney, a plumber. Among the twelve general conditions are the following restrictions on his liberty—things petitioner is forbidden to do unless he can first get a parole officer's permission:

- (1) Petitioner cannot leave the town of LaFayette, Georgia.¹⁶
- (2) Petitioner cannot change his residence even within the town of LaFayette.
- (3) He cannot own or operate a motor vehicle.
- (4) He cannot own or have in his possession legal firearms at any time for any purpose.

Other conditions direct petitioner to "live a clean, honest and temperate life," to "keep good company and good hours," to "keep away from all undesirable places," to "work regularly," and to follow his parole officer's instructions. Petitioner is required to report once a month to his parole officer and to permit this officer to visit his home and place of employment at any time (R. 20-21).

This custody is made effective by the sweeping statutory authority in the parole officials. Section 53-258 provides that the board, or its director alone, may issue a warrant

¹⁶ Population 5,588, according to the 1960 census.

for a parolee's rearrest "at any time, in its discretion, upon information or a showing of a violation or a probable violation by any parolee of any of the terms or conditions upon which he was released on parole. . . ." Upon such arrest the parolee is to be immediately returned "to the institution from which he was paroled, or to any other penal institution which may be designated." "Indeed, under §53-259 any parole officer may arrest a parolee without a warrant if in his judgment the parolee has violated a condition. And finally, §53-262 provides that "The Board, in its discretion, may revoke the parole and order the reincarceration of the prisoner. . . ." (These parole statutes are set out in the Appendix, *infra*.)

Thus Jones may be picked up and summarily put back in the penitentiary at any time without a hearing, purely on "information" which comes to the board's attention or on the "judgment" of a parole officer. See *United States v. Dillard*, 102 F. 2d 94 (4th Cir. 1939). And the board can revoke the parole altogether in its unfettered discretion; the statute does not require the breach of a condition.¹⁷ Virginia law guarantees no kind of hearing before revocation, although hearings are apparently held as a matter of policy.¹⁸ If a hearing is given, the parolee is still, under present law, entitled to few if any of the procedural protections of the Constitution.¹⁹ See *Escoe v. Zerbst*, 295 U.S. 490, 492; *Washington v. Hagan*, 287 F. 2d 332 (3d Cir.

¹⁷ Va. Code, § 53-262. See Kadish, Legal Norm and Discretion in the Police and Sentencing Processes, 75 Harv. L. Rev. 904, 917 n. 42 (1962).

¹⁸ Bureau of Public Administration, Univ. of Va., The Virginia Parole System: An Appraisal of the First Twelve Years 64 (1955). This indicates that between 1942 and 1953 paroles were revoked on 3 out of every 10 paroles.

¹⁹ See Kadish, *supra*, note 17 at 918-19.

1960); *Martin v. United States Bd. of Parole*, 199 F. Supp. 542 (D.D.C. 1961).

The upshot is that petitioner is confined to the town, to a house, and to his job.²⁰ If for any reason he should go outside the limits of LaFayette, Georgia, or move to a different house, or if he should even drive an automobile around town or borrow a shotgun to go squirrel hunting, without first going to his parole officer and getting permission, the temporary restricted "liberty" which he enjoys at the parole officials' sufferance could be terminated by immediate reincarceration without judicial proceedings. He is also chained to his job; he must work for Mr. McKinney, a plumber. Since petitioner, unlike citizens generally, is prevented by the parole board from going when and where he pleases—and where he would have a lawful right to go but for the parole—he is entitled, by the traditional test to a writ of habeas corpus to have the legality of the restraint judicially determined.

The restraint is made even plainer by the other general conditions. What is "good company"? What are "good hours"? What is "an undesirable place"? When does a person "work regularly"? The answers are left to the parole board or the parole officer; officials decide, without any hearing, whether Jones is abiding by these directions. Such vague standards, coupled with the broad authority to arrest, give the parole officer a sweeping power over every aspect of petitioner's life—the places he goes, the persons with whom he associates, the hours he keeps. If

²⁰ An analogy may be found in actions for false imprisonment. There plaintiff must prove he was imprisoned or confined. According to one view, if A serves on B an invalid warrant purporting to restrain B from leaving a certain town or state, A has confined B. Restatement, Torts § 36, comment B, illustrations 6-7 (1934). The parole order does just this.

not in the penitentiary, he lives always within the long shadow of its walls.

Another condition in the order worth noting is that petitioner refrain from violating any penal laws or ordinances. On the surface this seems merely to reiterate a restriction applicable to the general public. The court below said: "If he should commit a crime, his parole may be revoked, but any other citizen would be subject to arrest for the same offense" (R. 31). This superficial view, however, overlooks a critical difference. If an ordinary citizen is suspected, for example, of taking an automobile tire from a garage he would normally be indicted for larceny by a grand jury, or at least charged on information by the prosecutor. After being arrested, the citizen would usually be released on bail pending trial. Then he would be entitled to a trial by jury with full opportunity to present a defense. All the safeguards of the Constitution surround him. The state is burdened with proving his guilt beyond reasonable doubt. But the parolee would get none of this. If "information" came to the parole board that Jones had stolen a tire he could be arrested and put back into the penitentiary forthwith. He would have no trial; the state has no burden to establish before any tribunal. This is debatably justified on several theories, one of which is that Jones is already a convicted prisoner, and the relatively relaxed custody in which the state has placed him as a matter of grace may be tightened up again without going through a trial. Cf. *Zerbst v. Kidwell*, 304 U.S. 359.²¹ This fragile, easily broken line between prison and parole may be a useful distinction for some purposes, but it cannot rationally serve as a basis for denying petitioner any opportunity to obtain relief from his unconstitutionally imposed

²¹ See Note, *Parole Revocation Procedures*, 65 *Harv. L. Rev.* 309, 310-12 (1951).

sentence while he is on parole, when admittedly he would have a remedy were he in prison.

The direction to petitioner to obey the law has another consequence. For the ordinary citizen, a traffic violation or the breach of any municipal ordinance would hardly result in confinement in the penitentiary. But this is precisely the penalty Jones could receive for such a misdemeanor, since this would be a violation of his parole.

Recognizing these realities, a number of state and federal courts have held that the writ of habeas corpus is available to a parolee. Just last year the Second Circuit decided that a pending appeal from a denial of habeas corpus was not rendered moot by the paroling of the petitioner; the court considered this simply a "change in the nature of his confinement." *United States v. Fay*, 289 F.2d 470 (2d Cir. 1961). This is in line with an earlier dictum by Judge Learned Hand, *United States v. Bradford*, 194 F.2d 197, 200 (2d Cir. 1952), and a prior decision to the same effect under 28 U.S.C. §2255, which likewise embodies a "custody" requirement.²² *United States v. Brilliant*, 274 F.2d 618 (2d Cir. 1960). The Ninth Circuit on two occasions has squarely held that a habeas corpus proceeding is not mooted by parole. *Egan v. Teets*, 251 F.2d 571 (9th Cir. 1957); *Dickson v. Castle*, 244 F.2d 665 (9th Cir. 1957).

Those decisions are of course in conflict with the Fourth Circuit's decision in the instant case. Moreover, there are cases in other circuits, relied on by the court below, which are contrary to those of the Second and Ninth.²³ A close

²² *Heflin v. United States*, 358 U.S. 415, 418, 421 (majority and concurring opinions); *Parker v. Ellis*, 362 U.S. 574, 575 n.

²³ *Johnson v. Eckle*, 269 F.2d 836 (6th Cir. 1959); *United States v. Ragen*, 241 F.2d 126 (7th Cir. 1957); *United States v. Cummings*, 233 F.2d 187 (2d Cir. 1956); *Siercovich v. McDonald*, 193 F.2d 118 (5th Cir. 1951); *Adams v. Hiatt*, 173 F.2d 896 (3d Cir. 1949); *Factor v. Fox*, 175 F.2d 626 (6th Cir. 1949); *Van Meter v. Sanford*, 96 F.2d 511 (5th Cir. 1938).

reading, however, reveals that they rest almost entirely on this Court's order in *Weber v. Squier*, 315 U.S. 810, which merely denied certiorari "on the ground that the cause is moot, it appearing that petitioner has been released upon order of the United States Board of Parole and that he is no longer in the respondent's custody." The respondent in *Weber* was warden of the penitentiary, and certainly the parolee was out of his custody. That is all this Court said.²⁴ But with two exceptions,²⁵ the courts relying on *Weber* have followed it blindly without bothering to inquire whether the paroled prisoner had been transferred to the custody of an official other than the warden. In any event, *Weber*, being simply a denial of certiorari, does not stand in the way of the Court's reaching a right result on the facts of this case, now that the question is being fully argued for the first time.

Parker v. Ellis, 362 U.S. 574, is easily distinguishable from the case at bar. There the prisoner applying for habeas corpus completed his sentence while his case was still pending, and he was unconditionally released from all custody. He became as free as any citizen. No official thereafter exerted, or could possibly exert, any kind of restraint over his liberty by authority of that expired sentence. There was no one who could be named as a respondent. Thus the Court held that habeas corpus was moot.

²⁴ The misleading nature of *Weber* is noted in *Parker v. Ellis*, 362 U.S. 574, 589 n. 20 (dissenting opinion). Similar orders have accompanied denials of certiorari in *United States v. Downer*, 322 U.S. 756; *Zimmerman v. Innes*, 319 U.S. 744; *United States v. Crystal*, 319 U.S. 755; *Tornello v. Hudspeth*, 318 U.S. 792.

²⁵ See *Factgr v. Fox*, 175 F.2d 626, 628-29 (6th Cir. 1949); *Van Meter v. Sanford*, 99 F.2d 511 (5th Cir. 1938). These opinions, however, reflect the same erroneous assumption underlying the Fourth Circuit's decision, viz., that actual physical detention is essential to habeas corpus. They also represent a failure to understand realistically the nature of parole and the restraints it imposes on a prisoner.

That obviously does not touch this case where Jones remains in custody as a state prisoner restrained of his liberty by the state parole board under a sentence which does not expire until 1964.

Along with the Second and Ninth Circuits, the state courts in California and Florida have also held that a paroled prisoner may challenge the legality of the state's restraint over him by habeas corpus. *In re Marzeč*, 25 Cal. 2d 794, 797, 154 P. 2d 873, 874 (1946); *In re Bändmann*, 51 Cal. 2d 388, 396; 333 P. 2d 339, 344 (1958); *Carnley v. Cochran*, 123 So. 2d 249 (Fla. 1960); *Sellers v. Bridges*, 153 Fla. 586, 15 So. 2d 293. (1943). The constitutional claim asserted in *Carnley* was reviewed on the merits by this Court. 369 U.S. 506.

The Florida Supreme Court held the writ available in *Sellers* even though the petition was initially filed by a prisoner already on parole. The Court said:

The parolee, although at large while on parole, is a prisoner no less than a prisoner physically confined. He is enduring compulsory expiation of an offense. He is under daily personal restraint. He is at all times answerable to prison system officials for his conduct. Such officials have authority to greatly circumscribe his freedom of choice and action. Being amenable to prison system rules and authority and under immediate restraints is he not, to all practical purposes, in custody?²⁶

After reviewing the conditions of the parole—similar to those in the instant case—the court then asked further: "Can there be any doubt but that the terms and conditions imposed by the Parole Commission operate to greatly

²⁶ 153 Fla. 586, 588, 15 So. 2d 293, 294 (1943).

restrict the fundamental liberties and privileges of the individual?" Obviously the court had little doubt, for it discharged the petitioner on finding invalid the sentence under which he was paroled.

Judicial expressions in other contexts support the idea that a paroled prisoner remains in custody, that parole is a continuation of imprisonment, though in ameliorated form, and that it is in effect "an extension of the prison walls." *Anderson v. Corall*, 263 U. S. 193; *United States v. Dillard*, 102 F. 2d 94, 96 (4th Cir. 1939); *Story v. Rives*, 97 F. 2d 182, 188 (D.C. Cir. 1938); *United States v. Nicholson*, 78 F. 2d 468 (4th Cir. 1935); *Bell v. United States*, 203 F. Supp. 371 (N.D. Wise. 1962); *Serio v. Liss*, 189 F. Supp. 358, 362-63 (D.N.J. 1960). Moreover, this Court has indicated that parole is punishment within the Ex Post Facto Clause. *Lindsey v. Washington*, 301 U.S. 397. And in *Korematsu v. United States*, 319 U.S. 432, 435, the Court likened parole to probation in commenting that probation is punishment whereby "the liberty of an individual judicially determined to have committed an offense is abridged in the public interest."

As the National Parole Conference has said, parole is an integral part of the system of criminal justice.²⁷ It is a way of handling a criminal offender which grew out of a shift of penal philosophy from punishment to reformation. Along with probation and juvenile courts, it is a means of restoring the offender to society while at the same time protecting society from the offender.²⁸ Parole is an effort to bridge the gap for the prisoner between the abnormal environment of the penitentiary and the environment of the community to which he will return when his sentence

²⁷ Bureau of Public Administration, Univ. of Va., *The Virginia Parole System: An Appraisal of Its First Twelve Years* 1 (1955).

²⁸ Giardini, *The Parole Process* 5, 18-19 (1959).

expires. The Florida court put it well in *Sellers v. Bridges*, *supra*:

Parole, therefore, is not an act of amnesty or forgiveness—as some suppose. It does not put an end to sentence legally imposed. Rather, it is a continuation of sentence. The parole plan proceeds, in theory at least, upon the salutary principle that as the prison sentence of the individual must eventually terminate, the ends of society as a whole, as well as of the individual prisoner, will be better served by providing the prisoner a transition period for adjustment from the completely artificial life in a penal institution under continuous physical restraint and free from economic and social pressures to the untrammeled life of a free individual in a highly competitive society. The Florida Parole Commission is given statutory authority to determine the terms and conditions under which the prisoner may secure parole. Once secured, and upon the terms and conditions imposed by the Commission, prisoners become parolees (trustees outside prison walls, as it were) but prisoners amenable to discipline, direction, and supervision of prison system officials none the less.²⁹

Thus a paroledee is a prisoner still under sentence, one whom the state has permitted to move a step back toward ultimate freedom. To allow the state thereby to immunize the sentence from constitutional attack runs counter to common sense and the spirit of habeas corpus.³⁰ A statement made long ago seems applicable here:

²⁹ 153 Fla. 586, 589, 15 So.2d 293, 295 (1943); see also Giardini, *supra*, note 28 at 19.

³⁰ There is no merit in the suggestion that by accepting parole rather than penitentiary confinement Jones has waived his constitutional claim. When the state affords its prisoner a choice be-

It is not necessary, that the degradation of being incarcerated in a prison, should be undergone, to entitle any citizen who may consider himself unjustly charged with a breach of the laws, to a hearing. The whole spirit of the law is in favor of liberty; and if the words [of the Habeas Corpus Act] were doubtful, they should be construed liberally in favor of that blessing.³¹

The Great Writ must keep pace with all the varieties of restraints on liberty which may be devised. Parole is a relatively modern development in penology, coming on the scene in the last half of the Nineteenth Century. By 1901 only twenty states had parole laws, while today every state has a parole system.³² As penology continues to evolve, it is likely that additional ways will be found by which to deal with prisoners, other than simply keeping them in jail.³³

tween two kinds of custody and he chooses the less stringent; he cannot fairly be said to have surrendered his claim that his sentence is void and the state is without legal authority to hold him in any fashion. Concerning this point a court said: "But the agreement to be so bound [by the parole order] . . . must necessarily presuppose a valid imprisonment in the first instance to support the agreement. Such agreement may not be upheld if based upon a void charge or void judgment." *Sellers v. Bridges*, 153 Fla. 586, 590, 15 So.2d 293, 295 (1943).

³¹ *Commonwealth v. Ridgway*, 2 Ashn. 247, 248 (Pa. 1839), quoted in Church, *Habeas Corpus* 351 (1886).

³² Giardini, *The Parole Process* 12 (1959).

³³ For example: Va. Code, § 19.1-300 provides that when a defendant is convicted and "it is made to appear to the court that in the event of his being sentenced to confinement in jail his dependents may become public charges, [the court] may provide in the sentence for the release of such person from confinement on the days he is regularly employed under the supervision of a probation officer or such other suitable person as the court may designate, and under such conditions as it may fix, and require such person to pay such portion of any money earned by him as the court may determine to the court to be used for the support and maintenance of dependents and payment of fines, if any." Although a prisoner working on a job under this statute would not be in confinement, it is difficult to believe that habeas corpus would be unavailable to him.

If the writ is to serve its historic purpose it cannot be limited solely to the kind of restraint known to the Eighteenth Century. If habeas corpus can evolve in scope from a narrow inquiry into the jurisdiction of the sentencing court to an inquiry into a whole range of due process violations in the trial,³⁴ it is surely capable of acknowledging a type of restraint other than physical detention. That it has long ago done so, is revealed by the discussion which follows.

C. Habeas Corpus Is Available to a Paroled Prisoner Because He Is Subjected to a Kind of Restraint Which Traditionally Has Been Recognized as Sufficient for Habeas Corpus.

Since petitioner's liberty is in fact restrained by state officials this is an orthodox case for the use of habeas corpus to test the legality of the restraint. Viewed historically, there is no novelty about it. Anglo-American courts for two centuries have granted the Great Writ to release individuals from illegal restraints on their liberty other than physical confinement.

As a fairly recent example, the writ was granted where a petitioner, although committed to jail by court order, had never been put in jail but had been allowed to return home to attend his sick child on his promise to the sheriff that he would not leave his home or his office. *Ex parte Snodgrass*, 43 Tex. Cr. 359, 65 S.W. 1061 (1901). The court said that "any character or kind of restraint that precludes an absolute and perfect freedom of action" authorized the court by habeas corpus to release the person from such restraint, if illegal. See also *Ex parte Foster*, 44 Tex. Cr. 423, 71 S.W. 593 (1903). In *Ex parte Messervy*,

³⁴ Compare *Ex parte Watkins*, 3 Pet. 193, with *Johnson v. Zerbst*, 304 U.S. 458. See *United States v. Hayman*, 342 U.S. 205, 211-12.

80 S.C. 285, 61 S.E. 445 (1908), under a writ of *ne exeat* forbidding him from leaving the state, the petitioner had been arrested but then released on bail conditioned on his not departing the state. Although petitioner was at large the court allowed habeas corpus, saying that "the object of the writ is to release a citizen from any illegal restraint of his liberty."

Courts in this country have long utilized habeas corpus as a means of adjudicating the legality of an enlistment or induction into the military service.³⁵ The only detention in these cases is the mere state of being in the army or navy. There is no actual physical custody. These are not cases of arrest or court-martial conviction, for there the soldier would be under physical restraint, unlike other soldiers. Most courts have decided the legality of the enlistment or induction without even discussing the sufficiency of the restraint to support the writ. But in the few cases where it has been raised the courts have held that the requisite restraint was present. For example, in *United States v. Graham*, 57 F. Supp. 938, 941-43 (E.D. Ark. 1944), the court noted that the individual "is under no more restraint than any other soldier on active duty, who is subject to all the orders of his superior, both general orders and those directed to him personally," and then went on to say that the kind of restraint an enlisted man is under entitles him to the writ if his induction is illegal. Even less re-

³⁵ For early examples, see *United States v. Anderson*, 24 Fed. Cas. 813 (No. 14,449) (C.C.D. Tenn. 1812); *In re Falconer*, 91 Fed. 649 (S.D.N.Y. 1898); *In re Carver*, 103 Fed. 624 (C.C.D. Me. 1900); *Commonwealth v. Harrison*, 11 Mass. 63 (1814); *Moncrief v. Jones*, 33 Ga. 450 (1863); *Commonwealth v. Murray*, 4 Binn. 487 (Pa. 1812); *State v. Dimick*, 12 N.H. 194 (1841); *In re Carlton*, 7 Cow. 471 (N.Y. 1827). For later examples, see *Ex parte Cohen*, 254 Fed. 711 (E.D. Va. 1918); *Arbitman v. Woodside*, 258 Fed. 441 (4th Cir. 1919); and cases collected in *Hirabayashi v. United States*, 320 U.S. 81, 108 n. 2 (concurring opinion); Note, 10 Geo. Wash. L. Rev. 827, 829 n. 7.

straint existed in *United States v. Flint*, 54 F. Supp. 889 (D. Conn. 1943), *aff'd*, 142 F. 2d 62 (2d Cir. 1944), where a draftee petitioned for habeas corpus alleging that he had been illegally classified as 1-A. He had reported for induction, been placed under the authority of the commanding officer of the induction center, then put on inactive duty, transferred to the reserve, and released to return to his home with orders to report back some two weeks later. During that two-week period, when he filed the habeas corpus petition, he was free to go where he pleased. Yet the court rejected respondent's contention that the writ was unavailable for lack of restraint. And in *Ex parte Fabiani*, 105 F. Supp. 139 (E.D. Pa. 1952), the writ issued with still less restraint, for there the petitioner was merely under an order to report for induction into the army but had not yet reported to any official.

In another army case, the court held habeas corpus available to a soldier "administratively restricted" to the limits of a camp; he was not actually confined under lock or guard. *Girard v. Wilson*, 152 F. Supp. 21 (D.D.C. 1957), *rev'd on other grounds*, 354 U.S. 524.

These cases are unequivocal evidence that federal courts do not require the kind of close physical detention the court below spoke of before habeas corpus becomes available. They show that the writ is available to a person who, by a realistic appraisal of the circumstances, is deprived of his freedom to go and come at will. It takes little argument to establish that a person in the Army is not a free man. His situation is similar to that of a parolee. A soldier can go off post on week ends or at night on a pass. Indeed if he is married and lives off the post, as is true of many soldiers today, he goes home every night and practically is as free as a civilian. Yet he is still under a very real control, as is a parolee, to which citizens generally are not subject.

He must obey all orders of his commanding officer, and he is governed by the stringent regulations of the Military Code, just as a parolee must obey the parole officer and is governed by the terms of the parole order. A commanding officer has power to produce the body in court just as a parole officer does. As a remedy for illegal detention, *habeas corpus* should be as available to a parolee unconstitutionally convicted as it is to a soldier unlawfully inducted.

Wales v. Whitney, 114 U.S. 564, is distinguishable from the above cases as well as from the instant case. There court-martial charges were preferred against a naval medical officer already stationed in Washington, D. C.; the Secretary of the Navy placed him under arrest and ordered him to confine himself to the limits of the City of Washington pending trial. The officer filed a *habeas corpus* petition attacking the legality of his arrest on the ground that a court martial was without jurisdiction to try him on the charges preferred. The Court held *habeas corpus* unavailable. The following passage is the key to the decision:

... as Medical Director, he [petitioner] was residing in Washington and performing there the duties of his office. It is beyond dispute that the Secretary of the Navy had the right to direct him to reside in the city in performance of these duties. If he had been somewhere else the Secretary could have ordered him to Washington as Medical Director, and, in order to leave Washington lawfully, he would have to obtain leave of absence. He must, in such case, remain here until otherwise ordered or permitted. It is not easy to see how he is under any restraint of his personal liberty by the order of arrest, which he was not under before (114 U.S. at 569-70).

In other words, the petitioner was already confined to Washington by lawful orders of the Secretary. The arrest order thus placed no additional restraint on his liberty. Absent the arrest, he would still have been under the identical restrictions, *i.e.*, under orders stationing him in Washington. The court did not say that the restraint would have been insufficient had the officer been attacking the power of the naval authorities to subject him to any control. In fact it seemed to recognize this by saying that "those under military control, may all become proper subjects of relief by the writ of habeas corpus" (114 U.S. at 571). The fatal defect in *Wales* was that even if the court voided the challenged order the decision would not have resulted in the petitioner's release from the respondent's control. In this respect, the case is like that of a prisoner serving two sentences concurrently, one of which is valid and the other invalid; he cannot by habeas corpus obtain an adjudication as to the invalidity of one sentence since he would not be entitled to release in any event. *E.g., Ex parte Behrens*, 55 F. Supp. 460 (E.D. Wash. 1944).

Jones, however, as a paroled prisoner is in a materially different position. The parole order here, unlike the arrest order in *Wales*, does restrain petitioner in a way that he would not be restrained in the absence of the order. If the parole order and the sentence on which it rests were nullified Jones would be relieved of this restraint and would be as free as any citizen. A decision in his favor would result in his immediate release. *McNally v. Hill*, 293 U.S. 131, 138.

Child custody cases are further proof that habeas corpus lies for restraints far short of physical confinement. For over a century and a half the writ has been available to a parent to obtain the release of his child from the custody of one not legally entitled to custody. The courts have been unconcerned with whether the child was forcibly detained,

Indeed it affirmatively appears that this has not been essential. For example, in *Ex parte McClellan*, 1 Dow. 81 (K.B. 1831), the court expressly said that no showing of "any force or restraint" was necessary. In *Earl of Westmeath v. Countess of Westmeath*, 1 Jac. 251 (Ch. 1821), a habeas corpus proceeding brought by the Earl against his wife, the children were simply living with the wife. The court said that in the wife's return to the writ "it was stated that she lived separate and apart from her husband; that the infants were not under imprisonment, restraint, or duress of any kind . . . that she had the care and custody of their persons. . . ." Yet this did not defeat the writ, and the children were ordered released from the mother. In commenting on this the Georgia court once said: "To confine the writ of habeas corpus at common law, exclusively to cases of illegal confinement, would be destructive of the ends of justice." *In the Matter of Mitchell*, 1 Ga. Rep. Ann. 291 (1836).³⁶

In *Rex v. Delaval*, 3 Burr. 1434 (K.B. 1763), an eighteen year old girl had entered into "Covenants of Indentures of Apprenticeship" and was thereby apprenticed to a musician who in turn assigned her to Delaval who kept her as a mistress. It appeared that she "resided in his house, and publickly rode out on his Horses, attended by his Servants." Lord Mansfield, before whom a habeas corpus proceeding was brought on behalf of the girl, was not troubled by the sufficiency of the restraint to support the writ, and he ultimately ordered that she "be discharged from all Restraint, and be at liberty to go where she will."

The *Delaval* case is important because of the close similarity between an apprentice or indentured servant and a

³⁶ Other early cases of this type are *Mercein v. People*, 25 Wend. 64 (N.Y. 1840); *Commonwealth v. Briggs*, 16 Pick. 203 (Mass. 1834); *Commonwealth v. Addicks and Lee*, 2 Serg. & Rawle 174 (Pa. 1816).

parolee.' Each has a certain limited amount of freedom. Such a person is not physically imprisoned. But he is committed to the custody of someone else and is restricted in his place of abode, his job, and his activities generally. His liberty is substantially less than that of ordinary citizens. The crucial point for habeas corpus is that an individual in these positions cannot go when and where he pleases. In fact, the idea of modern parole, emerging after the mid-nineteenth century, seems to have come in part from the earlier servant arrangement.²³ Thus if the writ of habeas corpus lay in 1763 to free a person (not a prisoner) from an illegal indenture it follows that the writ lies today to free a parolee (who is a prisoner) from an illegal sentence.

The position of one held in slavery in pre-Civil War America is likewise analogous to that of a parolee, differing only perhaps in the degree of restraint. Most slaves were not in physical custody. In the country they roamed the fields, while a house servant in town often went about the streets unattended. Nevertheless, habeas corpus was recognized as a remedy for one claiming to be held illegally in slavery. See, e.g., *United States v. Davis*, 5 Cranch C.C. 622 (D.C.C.C. 1839). And rightly so, because a slave, like a parolee, is deprived by another of his freedom of mobility.

Aliens under exclusion orders preventing their entry into the United States have been allowed by this Court to challenge the validity of such orders by habeas corpus. *Shaughnessy v. Meiji*, 345 U.S. 206, 213; *Kuaff v. Shaughnessy*, 338 U.S. 537; *United States v. Jung Ah Lucy*, 124 U.S. 621, 626. In those cases the aliens were not bodily imprisoned. As far as the government was concerned they could have taken any outbound ship to any point in the world. The only restraint on their liberty being imposed by the respondents was the prevention of entry into this country. Yet

²³ See Giardini, *The Parole Process*, 5-12 (1953).

the Court had no difficulty in seeing this in its practical light as a restraint for which the Great Writ would lie. See also *Brownell v. Tom We Shung*, 352 U.S. 180, 183: "Admittedly, excluded aliens may test the order of their exclusion by habeas corpus." Again, this is in line with the rationale that for purposes of habeas corpus a person is restrained of his liberty whenever he is prevented by another from going when and where he pleases.

To support its position the court below pointed out that the writ was unavailable to a person charged with crime but at large on bail, citing two decisions of this Court.³⁸ Bail, however, is distinguishable from parole. A person on bail is generally under no restraint other than the duty to appear in court on a future date. While on bail he is not subject to the present, continuing restrictions which circumscribe a parolee's freedom. Even so, some federal and state courts have allowed habeas corpus to petitioners on bail. *Bates v. Bates*, 141 F. 2d 723 (D.C. Cir. 1944); *MacKenzie v. Barrett*, 141 Fed. 964 (7th Cir. 1905); *In re Petersen*, 51 Cal. 2d 177, 331 P. 2d 24 (1958); *Ex parte Messervy*, 80 S.C. 285, 61 S.E. 445 (1908).

D. The Change of Petitioner's Custodian From the State Penitentiary Superintendent to the State Parole Board Does Not Defeat His Pending Habeas Corpus Petition Because the State Parole Board Members Are Within the Jurisdiction of the District Court and Have Power to Produce Petitioner in Response to the Writ.

The appropriate respondent to a petition for habeas corpus is the person who has custody of the petitioner, i.e., the one who is restraining his liberty and who has power

³⁸ *Johnson v. Hoy*, 227 U.S. 245; *Stallings v. Splain*, 253 U.S. 339.

to produce him in court. 28 U.S.C. §2243.³⁹ Thus the members of the Virginia State Parole Board are now the proper parties respondent since, as previously discussed, they are imposing the restraint on petitioner's liberty and are his custodians by virtue of the parole order and the Virginia Code.⁴⁰ Moreover, as will be shown below, they can produce petitioner in court. Custody over petitioner has simply passed from one state official, the superintendent of the penitentiary, to other state officials, the parole board members.

The change of custodians by the state during the pendency of the habeas corpus application does not defeat the proceeding. The members of the parole board are all in the Eastern District of Virginia and thus within the territorial jurisdiction of the United States District Court where the petition was filed and where Jones was then detained. They are continuing custody over petitioner under the same allegedly unconstitutional sentence which was the basis of the superintendent's previous custody. The Commonwealth of Virginia continues to resist the issuance of the writ. The case thus comes squarely within *Ex parte Endo*, 323 U.S. 283, 304-07, where the petitioner, like Jones, was removed from the district after having filed a habeas corpus petition but an appropriate respondent remained in the district; the Court held there was no loss of jurisdiction. There is no requirement that the petitioner himself remain within the district throughout the proceeding. The writ is directed to the custodian, and it is

³⁹ This statute reads: "The writ, or order to show cause shall be directed to the person having custody of the person detained. . . .

"Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained." See *Johnson v. Eisentrager*, 330 U.S. 763, 778.

⁴⁰ Va. Code, §§ 53-257, 53-258, 53-259, 53-262, 53-289(3).

enough that a custodian can be reached by the district court's process. This is not a case like *Ahrens v. Clark*, 335 U.S. 188, where the petitioner was not being detained in the district at the time he initially filed his petition. The Court in *Ahrens* expressly distinguished the *Ex parte Endo* situation (335 U.S. at 193). See *Carbo v. United States*, 364 U.S. 614, 621-22.

Power in the board to produce petitioner in the district court in response to the writ is revealed by the recitation in the order that Jones is placed under the "control of the Virginia Parole Board," and the direction that Jones "Follow the parole officer's instructions" (R. 20, 21). If the parolee fails to obey an instruction the board may issue a warrant for his arrest, Va. Code, §53-258, or a parole officer may arrest him without a warrant, Va. Code, §53-259.

Jones, though a Virginia prisoner, is paroled in Georgia under the Uniform Act for Out-of-State Parolee Supervision (R. 19) which has been adopted by both states. Va. Code, §53-289; Ga. Code, §27-2701a (set out in the Appendix, *infra*). The Act provides:

That duly accredited officers of a sending State [Virginia] may at all times enter a receiving State [Georgia] and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of States party hereto, as to such persons. The decision of the sending State to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving State...

¹¹ Va. Code, § 53-289(3); Ga. Code, § 27-2701a(3). Moreover, Jones signed the following at the foot of the parole order: "I

This underscores the real power the Virginia board retains over Jones. Although there are no reported decisions dealing with this provision in Virginia or Georgia, courts of other states where the Act is in force have held, in accordance with its clear wording, that the receiving state has no authority to inquire into the reasons why a parolee is picked up by the sending state; the only questions open in the receiving state are the identity of the parolee and whether the arresting officer is in fact an official of the sending state.⁴² Furthermore, on word from the sending state an officer of the receiving state can arrest the parolee, and the receiving state's courts will still refuse to look behind the action.⁴³

From all this it appears that the Virginia parole board has several means for producing Jones in the federal court

agree that in the event I am arrested in any state or jurisdiction of the United States or any of its possessions for violation of this parole or for the commission of another offense, I will waive extradition and will return voluntarily to the state of Virginia" (R. 21-22).

⁴² *Woods v. State*, 264 Ala. 315, 87 So.2d 633 (1956); *Gulley v. Apple*, 213 Ark. 350, 210 S.W.2d 514 (1948); *In re Tenner*, 20 Cal.2d 670, 128 P.2d 338 (1942); *People v. Ruthazer*, 98 N.Y.S.2d 104 (1950), *aff'd*, 304 N.Y. 302, 107 N.E.2d 458 (1952); *Nagy v. Alvis*, 87 Ohio App. 251, 89 N.E.2d 177 (1949), *aff'd*, 152 Ohio St. 515, 96 N.E.2d 582 (1950); *Pierce v. Smith*, 31 Wash.2d 52, 195 P.2d 112 (1948). These decisions also hold the Act constitutional. It has been adopted in 48 states; citations are collected at Pa. Stat. Ann. tit. 61, § 321 (Supp. 1961).

⁴³ *State v. Waters*, 268 Ala. 454, 108 So.2d 146 (1959). Since the Act provides that the duties of supervision are to be governed by the same standards which prevail for the receiving state's own parolees (Va. Code, § 53-289[2]; Ga. Code, § 27-270[12]), it appears that the Georgia parole officials could arrest petitioner, without any request or order from the Virginia board, for a violation of any conditions of the parole, including failure to obey the Georgia parole supervisor's instructions. See Ga. Code, §§ 77-515, 77-517, 77-518. But this authority in the Georgia officials in no way subtracts from the power over petitioner vested in the Virginia board independently of the Georgia authorities.

in Virginia in response to a writ of habeas corpus. In the first place, the board can order Jones to appear in court; if he fails to comply he can be arrested and then taken to Richmond, because disobedience of instructions is a violation of a condition of the parole. Furthermore, the board could dispatch an agent to Georgia to "apprehend and retake" petitioner under the Uniform Act and bring him back to Richmond; this would not be subject to any interference from Georgia courts or officials. While these means are ample to produce petitioner in court by force if necessary, it is unlikely that such ultimate power will have to be invoked, for after all Jones himself is seeking the writ and would no doubt be quite willing to appear. It is interesting to note, because it highlights the board's control over Jones, that he would violate his parole and be subject to reincarceration if he did go to Richmond without official permission, as that would breach the condition forbidding him to leave the town of LaFayette, Georgia.

Since the members of the Virginia parole board presently have custody and control over petitioner, are within the district court's jurisdiction, and are legally and factually empowered to produce petitioner in the district court, they are appropriate respondents. Of course they were not named in the original habeas corpus petition because they had not acquired custody of petitioner at that time. Custody passed to them after the district court had denied the petition and while the case was awaiting argument in the Court of Appeals. Promptly after the board obtained custody from the superintendent (which was on June 26, 1961) petitioner made a motion in the Court of Appeals that the board members be made parties respondent (R. 23). The granting of this motion was all that was necessary to keep the proceeding from becoming moot.

Adding new custodians as parties to prevent a habeas corpus proceeding from failing for mootness has been done

before and presents no difficulty. In *Knewel v. Egan*, 268 U.S. 442, 448, a state prisoner had brought a habeas corpus proceeding in the federal district court seeking release from the custody of a sheriff. While the case was in this Court on appeal the original respondent, the person who had been serving as sheriff, went out of office and a newly elected individual took his place. The Court on motion ordered the new sheriff substituted. And in *Savelis v. Vlachos*, 137 F. Supp. 389 (E.D. Va. 1955), *aff'd*, 248 F. 2d 729 (4th Cir. 1957), a habeas corpus petition by seamen on a vessel docked at Norfolk; the master of the vessel was initially named respondent. But pending hearing the petitioners were transferred to a Public Health Service Hospital. The district judge said that since the master of the vessel was no longer custodian of petitioners the court, to avoid mootness, would order the substitution of the immigration officials as parties respondent having actual custody of petitioners during their stay at the hospital (137 F. Supp. at 400). See also *Ex parte Lind*, 323 U.S. 283, 306-07.

By dismissing this case and disregarding the motion to make the members of the parole board parties, the court below has in effect sanctioned a violation of Supreme Court Rule 49(1) which reads:

Pending review of a decision refusing a writ of habeas corpus, or refusing a rule to show cause why the writ should not be granted, the custody of the prisoner shall not be disturbed, except by order of the court wherein the case is then pending, or of a judge or justice thereof, upon a showing that custodial considerations require his removal. In such cases, the order of the court or judge or justice will make appropriate provision for substitution so that the case will not become moot.⁴⁴

⁴⁴ 346 U.S. 999. The Fourth Circuit's Rule 25 is similar: "Pending review of a decision refusing a writ of habeas corpus, the custody of the prisoner shall not be disturbed."

Unquestionably the "custody of the prisoner" here was "disturbed" by the state without any court order, and the court below has refused to "make appropriate provision for substitution so that the case will not become moot." The Court of Appeals has thus allowed the state, whatever its motive, to frustrate the Great Writ by the simple expedient of transferring petitioner from the custody of one official to the custody of other officials on the eve of argument. The purpose of Rule 49(1) is to prevent just this from happening. See *Bolden v. Clemmer*, 298 F. 2d 303 (D.C. Cir. 1961). Happily in this case the matter can be rectified by bringing in the new custodians since they are within the district court's reach. *Ex parte Endo, supra*. The judgment of the Court of Appeals should be reversed with directions accordingly:

II. If the Court Concludes That Petitioner's Constitutional Claim Could No Longer Be Adjudicated by Habeas Corpus After He Was Paroled, the Court of Appeals Should Be Directed to Consider the Case as a Declaratory Judgment Action and Thereby Decide the Claim Because This Is a Civil Action Presenting a Justiciable Controversy Within the Court's Jurisdiction and There Is Now No Other Remedy for Violation of Petitioner's Constitutional Right to Counsel.

A holding that this case is moot as a habeas corpus proceeding, for a reason peculiar to habeas corpus, *viz.*, that petitioner is not now in "custody" under §2241, still does not require a dismissal. The action can be treated as one for a declaratory judgment that the sentence is constitutionally invalid, and the court can proceed to decide the same question it would have decided on habeas corpus—whether petitioner's right to counsel was violated in the 1946 larceny conviction.

By not discussing the declaratory judgment question, although it was argued by petitioner, the Court of Appeals

has left unclear whether it believed this remedy is not available at all to petitioner or whether it thought that even though the remedy is appropriate petitioner should file suit all over again in the district court, labelling his papers "declaratory judgment" instead of "habeas corpus." Either way the court erred.

Section 2201 of Title 28 authorizes any court of the United States in an actual controversy within its jurisdiction to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

There is here a justiciable controversy within Article III of the Constitution. On the one hand, Jones claims that because of the unconstitutional denial of counsel in his larceny trial that conviction is void as well as the subsequent recidivist sentence under which he is held on parole, that the Virginia authorities accordingly cannot lawfully confine him in prison or subject him to the restrictions of parole. On the other hand, the Virginia Parole Board, as successor to the penitentiary superintendent, claims that the recidivist sentence is valid and that under it Jones may be kept on parole or even reincarcerated. (It is here assumed that the parole board members should be made parties pursuant to petitioner's motion [R. 23] and as argued above.) This is a genuine clash between adverse parties over present legal interests. Judge Sobeloff agreed in his concurring opinion below that the case was still justiciable (R. 32), citing *Fiswick v. United States*, 329 U.S. 211, 220-23. The other two judges did not disagree with this; they simply did not reach the question.

Not only is the case within Article III, it also falls within the congressional grant of authority to the federal courts in 28 U.S.C. §1343(3), for this is clearly an action "to redress the deprivation, under color of . . . state law . . ."

of a "right secured by the Constitution of the United States. . . ." If this statute can support jurisdiction to enjoin a state criminal prosecution on the ground that the prosecution would infringe First Amendment rights, *Douglas v. City of Jeannette*, 319 U.S. 157, *a fortiori* it allows an action for a declaration that a sentence (admittedly subject to collateral attack) was imposed in violation of the Constitution.

Since the case falls within the Constitutional and statutory authority of the federal courts, there is no objection on principle or authority to giving a declaration as to the validity of petitioner's sentence, especially since he now has no other remedy. Indeed, authority supports it. For example, it has been held that a prisoner can attack a parole revocation proceeding by a declaratory action even though habeas corpus is also available. *Hurley v. Reed*, 288 F. 2d 844 (D.C. Cir. 1961); *Washington v. Hagan*, 287 F. 2d 332 (3d Cir. 1960). Of course if habeas corpus is not open, as would be the case here, then the reason for a declaratory judgment is much stronger.⁴⁵ The parolee's position is like that of an alien under an exclusion order, as in *Brownell v. Tom We Shung*, 352 U.S. 180, where the Court explained that the order can be attacked by habeas corpus if the alien is detained, but, in any event, he can get an adjudication of the same question by way of a declaratory decree. The scope of review would not differ. Likewise, if the petitioner here is considered not in "custody" the court can nevertheless give a declaration as to the unconstitutionality

⁴⁵ Two federal decisions refusing declaratory judgments to prisoners attacking their sentences were based on the ground that other remedies were available. *Tuckson v. Clemmer*, 231 F.2d 658 (4th Cir. 1956); *Clark v. Memolo*, 174 F.2d 978 (D.C. Cir. 1949). Neither is in point here, since Jones is without any other remedy. Compare *Bell v. United States*, 203 F. Supp. 371 (W.D. Wise 1962), where the reasons for denying declaratory relief to a parolee are likewise not applicable here.

of his sentence, as this would not involve the "custody" requirement.

The indirect suggestion in two dissenting opinions in *Parker v. Ellis*, 362 U.S. 574, 585, 597, 598, that habeas corpus is the sole remedy for an unconstitutionally convicted state prisoner, whatever its merit in that case, does not apply here. In *Parker*, the prisoner had fully served his sentence, and the lack of any adverse party defendant might have been enough to destroy justiciability and hence block a declaratory judgment. Obviously the general manager of the Texas state prison system, the only party named there by petitioner, no longer had a justiciable dispute with the former inmate—and no effort appears to have been made to join anyone else as a defendant. Here, by contrast, Jones has moved to bring in the Virginia Parole Board against whom he has a continuing live claim as to his unexpired sentence. But in any event, *Parker* is no authority for denying declaratory relief, because this question was neither raised nor decided there.

In opposition to giving petitioner relief, it might be argued that because the Virginia state courts have passed upon and rejected petitioner's federal claim a declaratory action is barred by *res judicata*, although the objection would not apply to a habeas corpus application. *Brown v. Allen*, 344 U.S. 443, 458; *Darr v. Burford*, 339 U.S. 200, 214. While the argument may have a superficial appeal, it is submitted that history and close analysis require its rejection.

The historical reasons for exempting habeas corpus from the ordinary rules of *res judicata* tend to be overlooked. Today the point is usually made by assertion without explanation, as in *Darr v. Burford, supra*, where the Court said, "All the authorities agree that *res judicata* does not apply to applications for habeas corpus." The court there

cited *Salinger v. Loisel*, 265 U.S. 224, 230, which held that a decision by a federal court on habeas corpus refusing to discharge a prisoner would not be *res judicata* in a later federal habeas corpus application. In both *Darr* and *Salinger* the former proceeding in question was habeas corpus. The common law and text writers agree with this Court that one adverse habeas corpus decision does not preclude repetitious applications. *Darr v. Burford*, made it clear that a *state* habeas corpus decision does not bar habeas corpus in the *federal* courts.

The policies underlying this rule likewise require that a state habeas corpus ruling, as in the instant case, not be *res judicata* in a federal declaratory action. A decision on habeas corpus has always been unique. Historically, it was denied *res judicata* effect because it was not considered a final judgment,⁴⁶ and only final judgments traditionally operate as *res judicata*.⁴⁷ The common law apparently took this view because of the importance attached to "the liberty of the subject"; a person was thus allowed to go from judge to judge, and any judge could grant him freedom even though others previously had denied the writ. See *Brown v. Allen, supra* at 509.⁴⁸

⁴⁶ Church, *Habeas Corpus* 518-19 (1886); Hurd, *Habeas Corpus* 562-70 (1858). At common law this lack of finality also prevented review of a habeas corpus decision by writ of error. This non-reviewable aspect has been changed by statute in the federal courts. 28 U.S.C. § 2253.

⁴⁷ Restatement, *Judgments* § 41 (1942).

⁴⁸ In *Brown v. Allen*, 344 U.S. 443, 458, the Court, apparently for the first time, said that even though the federal claim had been passed on in the original state trial and on direct appellate review the state judgment would still not be *res judicata* in a federal habeas corpus court. This goes beyond the common law rationale set out in the text, and it is not the case here since the Virginia courts passed on Jones' federal claim only on habeas corpus. The view in *Brown* probably resulted from the expanded scope of habeas corpus brought about under the 1867 Act and by the wider protections now afforded criminal defendants by the Fourteenth Amendment.

That being so, it is immaterial whether the later action is another habeas corpus petition or an action for declaratory judgment. The policy still holds. In either case the former judgment attempted to be set up as *res judicata* is a non-final habeas corpus ruling. And it is the former judgment which is the point of focus when a *res judicata* question is raised. Petitioner's interest in being freed of parole restrictions stemming from an invalid sentence deserves as much weight when asserted in a declaratory action as when asserted by habeas corpus petition. Liberty is still at stake, even if the Court thinks that "custody" under 2241 is lacking.

Assuming that a declaratory judgment is available as a remedy for petitioner, there is no justification for dismissing the case and compelling him to file a new action. Such a disposition would be based solely on the ground that petitioner had chosen the wrong procedural route, or rather that the route chosen had become inappropriate because of facts occurring after suit was filed and through no fault of petitioner's. That archaic view has no place in the federal judiciary, especially when the constitutional claim of an indigent is involved.

Federal courts have long ago discarded rigid "theory of pleading" concepts, and the forms of action have been abolished. The spirit of federal practice today is to give a person whatever remedy he is entitled to under the law and the facts of his case. The procedural designation given the case is not controlling, and it is not even necessary that a party demand particular relief for the court to grant it. See Fed. R. Civ. P. 54(e). Habeas corpus is a civil action, *Riddle v. Duche*, 262 U.S. 333, 336, as is a declaratory proceeding. In not going on to decide the case, the court below seriously departed from enlightened modern practice. This is underscored by 28 U.S.C. §2106 which directs any "court

of appellate jurisdiction" to make such disposition of the case "as may be just under the circumstances." And in doing this, supervening events are to be considered. *Paterson v. Alabama*, 294 U.S. 600, 607.

In *Miteg v. Lorette*, 193 F.2d 712, 713 (4th Cir. 1952) and *Girard v. Wilson*, 152 F. Supp. 21, 27 (D.D.C. 1957),⁴⁹ the courts expressly treated habeas corpus petitions as actions for declaratory judgments, since habeas corpus was found to be inappropriate under the facts of those cases. Doing this is in keeping with the spirit manifested by this Court when it said in a related context, "In behalf of the unfortunates, federal courts should act in doing justice if the record makes plain a right to relief." *United States v. Morgan*, 346 U.S. 502, 505.⁵⁰

Similar procedural flexibility has also been indulged by this Court in analogous situations. In *Hefflin v. United States*, 358 U.S. 415, 418, the Court indicated that where a federal prisoner is entitled to relief from an illegal sentence it was immaterial whether he moved under §2255 or Rule 35 of the Federal Rules of Criminal Procedure. Another relevant practice concerns original applications for habeas corpus in this Court. The Court usually denies them as such but then treats them as petitions for certiorari to review a decision below. *In re Shuttlesworth*, 369 U.S. 357.

⁴⁹ Reversed on other grounds, *sub nom. Wilson v. Girard*, 354 U.S. 524.

⁵⁰ It may be that relief is available to petitioner by writ of error *coram nobis* under 28 U.S.C. § 1651. This was recognized in *United States v. Morgan*, 346 U.S. 502, as a means of attacking a sentence for denial of the right to counsel where the petitioner was out of custody and hence could not bring habeas corpus. *Coram nobis* does not require custody. See also *Shelton v. United States*, 242 F.2d 101 (5th Cir. 1957); *Roberts v. United States*, 158 F.2d 150 (4th Cir. 1946). However, no federal *coram nobis* case has been located involving a state prisoner. While the writ might be so utilized it seems unnecessary to argue this since either habeas corpus or declaratory judgment affords petitioner a remedy.

Lotz v. Sacks, 368 U.S. 923. This is done in the interest of justice, without express provision for it in the Court's rules.

Thus on principle and authority there is no good reason to refuse relief to petitioner even if the court should conclude that habeas corpus is not the correct procedural pigeon hole. Petitioner is entitled to an adjudication on the merits of his constitutional claim, and the Declaratory Judgment Act provides the means for giving it to him.

Conclusion

For the reasons set forth, the judgment of the Court of Appeals should be reversed and the case remanded to that court with directions that the members of the Virginia Parole Board be made parties respondent and that the Court of Appeals proceed to decide the appeal either as a habeas corpus petition or declaratory judgment action.

Respectfully submitted,

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APPENDIX

CODE OF VIRGINIA:

§ 53-257. Parolees to comply with terms; furnishing copies.—Each parolee while on parole shall comply with such terms and conditions as may be prescribed by the Parole Board. When any prisoner is released on parole, the Director shall furnish such parolee, and the probation and parole officer having supervision of such parolee, a copy of the terms and conditions of the parole and any changes which may from time to time be made therein.

§ 53-258. Arrest and return of parolee to institution.—The Parole Board may at any time, in its discretion, upon information or a showing of a violation or a probable violation by any parolee of any of the terms or conditions upon which he was released on parole, issue, or cause to be issued, a warrant for the arrest and return of such parolee to the institution from which he was paroled, or to any other penal institution which may be designated by the Board. The Director may also at any time, in his discretion, upon information or a showing of a violation or probable violation by any parolee of any of the terms or conditions upon which such parolee was released on parole, issue, or cause to be issued, a warrant for the arrest and return of such parolee to the institution from which he was paroled, or to any other penal institution which may be designated by the Director. Each such warrant shall authorize all officers named therein to arrest and return such parolee to actual custody in the penal institution from which he was paroled, or to any other institution designated by the Parole Board or the Director, as the case may be.

§ 53-259. Arrest of parolee without warrant.—Any probation and parole officer may arrest a parolee without a warrant, or may deputize any other officer with power of arrest to do so, by a written statement setting forth that the parolee has, in the judgment of such probation and parole officer, violated one or more of the terms or conditions upon which such parolee was released on parole. Such a written

statement by a probation and parole officer delivered to the officer in charge of any State or local penal institution shall be sufficient warrant for the detention of the parolee.

§ 53-262. Revocation of parole; extension of terms and conditions of parole; further confinement.—Whenever any parolee is arrested and re-committed as hereinbefore provided, the Parole Board shall consider the case and act with reference thereto as soon as it may be conveniently possible. The Board, in its discretion, may revoke the parole and order the reincarceration of the prisoner for the unserved portion of the term of imprisonment originally imposed upon him, or it may reinstate the parole either upon such terms and conditions as were originally prescribed or as may be prescribed in addition thereto or in lieu thereof.

§ 53-264. Release of prisoner subject to parole.—The Director of the Department of Welfare and Institutions shall release, or cause to be released, into the custody of the Parole Board or any of its probation and parole officers or the Director of Parole, any prisoner subject to parole under the laws of this State whenever directed so to do by the Parole Board or by the Director of Parole.

UNIFORM ACT FOR OUT-OF-STATE PAROLEE SUPERVISION

V.A. CODE, § 53-289; GA. CODE, § 27-2701a.

The form of the compact shall be substantially as follows:

A compact entered into by and among the contracting states, signatures hereto, with the consent of the Congress of the United States of America, granted by an act entitled "an act granting the consent of Congress to any two or more States to enter into agreements or compacts for co-operative effort and mutual assistance in the prevention of crime and for other purposes."

The contracting States solemnly agree:

(1) That it shall be competent for the duly constituted judicial and administrative authorities of a State party to this compact (herein called "sending State"), to permit any person convicted of an offense within such State and

placed on probation or released on parole to reside in any other State party to this compact (herein called "receiving State"), while on probation or parole, if

(a). Such person is in fact a resident of or has his family residing within the receiving State and can obtain employment there;

(b) Though not a resident of the receiving State and not having his family residing there, the receiving State consents to such person being sent there.

Before granting such permission, opportunity shall be granted to the receiving State to investigate the home and prospective employment of such person.

A resident of the receiving State, within the meaning of this compact, is one who has been an actual inhabitant of such State continuously for more than one year prior to his coming to the sending State and has not resided within the sending State more than six continuous months immediately preceding the commission of the offense for which he has been convicted.

(2) That each receiving State will assume the duties of visitation of and supervision over probationers or parolees of any sending State and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees.

(3) That duly accredited officers of a sending State may at all times enter a receiving State and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of States party hereto, as to such persons. The decision of the sending State to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving State. Provided, however, that if at the time when a State seeks to retake a probationer or parolee there should be pending against him within the receiving State any criminal charge, or he should be suspected of having committed within such State

a criminal offense, he shall not be retaken without the consent of the receiving State until discharged from prosecution or from imprisonment for such offense.

(4) That the duly accredited officers of the sending State will be permitted to transport prisoners being retaken through any and all States parties to this compact, without interference.

(5) That the Governor of each State may designate an officer who, acting jointly with like officers of other contracting States, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact.

(6) That this compact shall become operative immediately upon its execution by any State as between it and any other State or States so executing. When executed it shall have the full force and effect of law within such State, the form of execution to be in accordance with the laws of the executing State.

(7) That this compact shall continue in force and remain binding upon each executing State until renounced by it. The duties and obligations hereunder of a renouncing State shall continue as to parolees or probationers residing therein at the time of withdrawal until retaken or finally discharged by the sending State. Renunciation of this compact shall be by the same authority which executed it, by sending six months' notice in writing of its intention to withdraw from the compact to the other States party hereto.